DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

Rod McDougall

R75-494
R75-706

June 10, 1976

76-180

Mr. J. William Brammer
DeConcini, McDonald, Brammer & Yetwin
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701

Dear Mr. Brammer:

This letter will inform you that this office generally concurs with the opinion rendered by you to Mr. John J. Bauman, Assistant Superintendent, Flowing Wells Public Schools, dated November 4, 1975, revising your earlier opinion dated August 5, 1975. Because of the importance of the questions considered in the opinion, we are inclined to add the following discussion of the law.

Question 1. In Arizona, special assessments can be levied in any unincorporated area by county improvement districts created pursuant to the requirements and limitations of Title 11, Chapter 5, Article 1, Arizona Revised Statutes. Although improvements can be constructed without the creation of an improvement district, it would appear that a special assessment can only be levied when an improvement district has been created pursuant to the statutes. There appears to have been no county improvement district created which includes the location of the proposed construction site; thus, special assessments arising out of the construction of adequate sewer facilities cannot now be legally imposed. And in the event that a county improvement district is subsequently created pursuant to the statutes, A.R.S. § 11-719 has to be followed:

> §11-719. Assessment of public property.
>
> A. When a lot belonging to the United States, the state [or a] school district . . . fronts upon the proposed work or improvements, or is included within the assessment district declared by the board of directors in its resolution of intention to be the district to be assessed to pay the costs and expenses thereof, the board of directors shall, in the resolution of intention, declare whether or not such lot shall be omitted from the assessment thereafter to be made.

B. If the lot is omitted from the assessment, then the total expense of all work done shall be assessed on the remaining lots fronting on the work or improvement, or lying within the assessment district, without regard to the omitted lot.

C. If the board of directors declares the lot included in the assessment, or if no declaration is made respecting the lot, then the district shall be liable for and shall pay such sum as thereafter may be assessed against the lot. The amount of the assessment levied against the lot may be included in any bonds issued from the improvement, and if so included, the assessments shall bear the same interest, and be payable by the district in installments, as assessments against property of private persons.

D. The district may contract with the state, or body to which the lot belongs, for payment to the district of the assessment and interest as it becomes due and payable, and the state, or such body, shall perform the contract. (Emphasis added.)

Thus, even if a county improvement district is created so as to include the area of the new school, special assessments cannot be imposed upon the school district. If the property is omitted from the assessment district, "the total expense of all work done shall be assessed on the remaining lots . . . without regard to the [school district property]", subsection B; alternatively, if the school district property is included within the assessment district, then the improvement district[1] is

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1. The term "district" used in subsection C of the statute is somewhat imprecise; however, it clearly cannot be construed to refer to school districts because that meaning would be utterly senseless in any of the other contexts in which the statute is applicable, namely, where lots are owned by the United States, a country or a city, etc. The fact that the term "district" used throughout the remainder of the chapter apparently was meant to refer to "improvement district," and the fact that the interpretation of the term so as to mean assessment district would render subsection B to a nullity, suggests that the proper sense of the term would be "improvement district". This interpretation is also supported by analogy to A.R.S. § 9-679 governing special assessments by municipalities.

required to pay the assessment which would have otherwise been levied against the school property, subsection C. Consequently, unless the school district agrees otherwise, subsection D, a special assessment cannot be involuntarily imposed upon school district property. See Attorney General's Opinions Nos. 59-111 and 71-33. Contra, City of Phoenix v. Wilson, 39 Ariz. 250, 5 P.2d 411 (1931); Attorney General Opinion No. 57-45.

Question 2. We agree that Travaini v. Maricopa County, 9 Ariz.App. 228, 450 P.2d 1021 (1969), held that the entity providing utility services (therein the City of Phoenix) cannot unreasonably deny property owners an opportunity to utilize the services provided, and that on the facts of that case, the Court required that Phoenix permit Maricopa County to "connect with the existing sewer line even though the City may have to build a new line to accommodate sewage from the [new building]. . . ." Id. at 230.

It should be noted, however, that the parties in Travaini had stipulated that:

> "[t]he existing sewer lines are the property of the City of Phoenix, and any new or enlarged sewer facilities [if constructed] would also be the property of the City of Phoenix." Id. at 229.

It would appear that the existence of this stipulation was a significant factor to the Court. The Court specifically noted that inasmuch as:

> "any enlargements or additions to the existing sewer facilities [would become] the property of the City of Phoenix, to require the County alone to pay for this city improvement would unduly discriminate against the County contrary to the rationale of Veach v. City of Phoenix, . . ." Id. at 230.

Insofar as it would be impossible to determine at this point whether or not the same type of agreement between the District and Pima County could be arrived at, it should be noted that the absence of a similar agreement could afford a basis for distinguishing the holding of Travaini from the present situation. It should also be noted that the holding of Travaini appears to be contrary to the great majority of cases which have held that the decision by a municipality or other governmental body to

extend or add to existing water, sewer and other utility services is a matter within the discretion of the governing board of the governmental body, unreviewable by the courts absent an abuse of discretion, and additionally, that the following language used by Mr. Justice Udall in Veach[2] appears to embrace the rationale of the majority rather than the minority rule:

> "In order to avoid misunderstanding we want to make it clear that under the rule we have adopted a municipality has no absolute duty to provide water for fire protection purposes to its inhabitants. However, when a city assumes the responsibility of furnishing fire protection, then it has the duty of giving each person or property owner such reasonable protection as others within a similar area within the municipality are accorded under like circumstances. A municipality has discretion, governed by the extent of need and other economic considerations, to determine what is a reasonable protection for each area--but this discretion cannot be arbitrary, and must be fairly and reasonably exercised. Hence, in suits such as the instant one, a city is entitled to assert as a defense the reasonableness of its exercise of discretion."

> "It is impossible to delineate specific criteria by which a municipality should be guided in providing reasonable protection. When challenged in an action such as this, it is a question for the determination of the jury as to whether the municipality has acted reasonably in setting up an ordinance, regulation or the activities of its agents under the circumstances of the case in the light of the rule herein pronounced." Id. at 197.

See also Town of Wickenburg v. Sabin, 68 Ariz. 75, 700 P.2d 342 (1948), wherein the majority rule was acknowledged although not reached by the Court in its decision.

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2. Veach, although relied upon in Travaini, merely held that a municipality can be liable in tort for its negligent failure to provide fire protection services to an injured resident plaintiff where under the facts as alleged the municipality had held itself out as purporting to supply those services generally.

See also Rowland v. McBride, 35 Ariz. 511, 281 P.2d 207 (1929).

Sincerely,

BRUCE E. BABBITT
Attorney General

Frank Fleming

FRANCIS G. FLEMING
Assistant Attorney General

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